(5)

No. 06-581

FILED
NOV 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

ALLEGRETTI & COMPANY,
Petitioner,

vs.

COUNTY OF IMPERIAL, CALIFORNIA,
Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I respectfully request that this Court grant review of *Allegretti & Company v. County of Imperial,* 138 Cal.App.4th 1261. The parties have consented to the filing of this amicus curiae brief by filing their blanket consent letter with the Court.[1]

The power of eminent domain is a formidable one, and in order for attorneys such as myself to be able to properly counsel their clients, we need more guidance than current case law contains. As an active eminent domain practitioner, I am aware of the serious issues that have yet to be answered in the eminent domain field. In particular, I and my clients have struggled with each of the issues raised in the *Allegretti*, including (1) how to determine the

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[1] Amicus states that he authored and paid for this brief. This brief was not written in whole or in part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation. (Supreme Court Rule 37.6.)

meaning of loss of "all economically viable use," (2) how to prove the impairment of "distinct" investment-backed expectations", and (3) how to reconcile the rules of *Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal.4th 761 (with its holding that the receipt of rent and the absence of physical invasion do not negate the existence of a taking) with cases like *Allegretti*, with their holdings that the receipt of income precludes the finding of a taking.

Moreover, as the State's population grows, the ability of property owners to use the water beneath their own land becomes more important. So, too, is the extent to which the government can regulate that use without violating either the constitutional mandate to put water to beneficial use or the constitutional protection of private property rights.

One of my current cases involves water rights on the San Joaquin Delta, where my client is losing those rights as the result of the Bethel Island bridge reconstruction. On other cases, the deciding issue is what constitutes a "loss of all economically viable use" of the subject property. On behalf of those clients, I request that the Court grant review of *Allegretti.*

When a client consults me regarding regulatory takings, the issue often is what constitutes a loss of "all economically viable use" of the specific property. Does any use mean an economically viable use? What is the standard? Is the standard a reasonableness test, or one specific to the owner of the property? And, who has the burden of proof on this issue?

Currently, I must answer the client's question "has the government action prevented all economically viable use of my property" with "we have to file suit, and we'll both find out together."

Filing suit is an unreasonable way to answer the question. It is also a costly method for the client, the agency, and the judiciary.

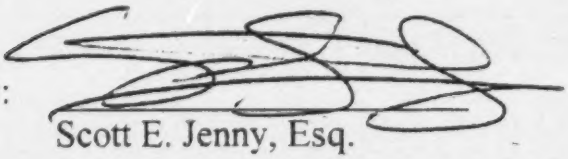
There are no criteria to explain the parameters of "economic viability." There is simply no judicial guidance to help me answer that question short of litigation. I ask for guidance from this Court, so that I am able to give more guidance to my clients.

Furthermore, apart from these specific clients, I have a strong interest in the development of a clear, consistent body of eminent domain law, and on that basis also request a grant of review.

On behalf of my clients, and the pursuit of a consistent body of eminent domain law, I respectfully request that this Court grant review of *Allegretti.*

Respectfully submitted,

JENNY, JENNY & JENNY, LLP

By: 

Scott E. Jenny, Esq.

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October 30, 2006

William K. Suter, Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

Re: Allegretti v. County of Imperial
No. 06-581

Dear Mr. Suter:

Petitioner and Respondent, through their respective Counsel of Record, hereby provide blanket consent to the filing of amicus curiae briefs in support of or in opposition to the Petition for Writ of Certiorari in the above-entitled case.

Sincerely,

Michael M. Berger
Counsel of Record for Petitioner
Allegretti and Company

Antonio Rossmann
Counsel of Record for Respondent
County of Imperial, California

COPY
original sent
11/2/06

PROOF OF SERVICE – C.C.P. 1013a, 2015.5

I declare:

I am employed in the City of Martinez, Contra Costa County, State of California. I am over the age of 18 years and not a party to the within action. My business address is 706 Main Street, Suite C, Martinez, California 94553.

On November 22, 2006 I served the foregoing document described as: AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI by placing a true copy thereof in a sealed envelope addressed as stated below:

Michael M. Berger
Manatt, Phelps & Phillips LLP
11355 W. Olympic Blvd.
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X (BY MAIL) I am readily familiar with the practice of this firm for the collection and processing of correspondence for mailing with the United States Postal Service and such envelope was placed for collection and mailing on the above date according to the ordinary practice of Jenny, Jenny & Jenny.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 22, 2006 at Martinez, California.

Richard K. Jenny